SUPREME COURT, U. S.

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In the

Supreme Court of the United States

October Term, 1966
No. 1066

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION et al.,
Petitioners

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR REHEARING AND RECONSIDERATION

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PETITION FOR REHEARING AND RECONSIDERATION

To the Honorable, the Justices of Said Court:

The petition of the Pennsylvania Public Utility Commission respectfully represents:

1. That the Petition for Certiorari was denied by your Honorable Court on March 27, 1967, and the Pennsylvania Public Utility Commission files this petition for rehearing and reconsideration. We submit the following discussion for the purpose of convincing your Honorable

Court that there is merit to the position of the Pennsylvania Public Utility Commission that the procedures followed in the instant case were inadequate when judged against constitutional standards previously laid down.

I. Colorado v. U.S., 271 U.S. 153, Is Not Authority for the Proposition that Intrastate Service May Be Ordered Abandoned Without a Hearing or Findings

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Respondent in its Brief cites *Colorado v. United States,* 271 U.S. 153, for the proposition that there is no "implied limitation in the commerce clause that requires a hearing and a finding of burden on interstate commerce as a condition precedent to the application of this regulatory power to the intrastate segment of service provided by an interstate train." (p. 8).

The *Colorado* case involved an application by the railroad to abandon a branch line which was operating in interstate commerce within the State of Colorado. A hearing was held in accordance with the Interstate Commerce Act under Sec. 1(18). The Interstate Commerce Commission issued its decision finding that even after the discontinuance of the interstate service, the remaining intrastate service of the line would still constitute a burden upon the railroad, which continued to engage in interstate commerce.

Parenthetically, this is the essential difference from *Texas v. Eastern Texas R.R.*, 258 U.S. 204, where the I.C.C. did not, and could not, upon the evidence, find that after the discontinuance of the interstate service, the remaining intrastate service would still constitute a burden

upon the railroad, because the railroad there did not have any other interstate operations.

In the *Colorado* case the issue was not whether a hearing should have been held, or findings made, *since both were in fact done.* Respondent by making the statement, quoted at the outset, would have the Court believe that this was the issue.

The issue in the *Colorado* case was whether the Interstate Commerce Commission had to make ultimate findings that interstate commerce was discriminated against, or that the company was prevented from earning a fair return, or that the entire intrastate business would not earn a fair return. The Interstate Commerce Act, Sec. 1(18), provides for the issuance of a certificate of abandonment upon a finding "that the present or future public convenience and necessity permit of such abandonment." Your Honorable Court, in accordance with the statute, stated that this was the only ultimate finding that had to be made. Your Honorable Court pertinently stated that in determining whether the abandonment would be consistent with the public necessity and convenience the Commission would have to consider such factors as the burden upon interstate commerce, the benefits to the public, etc. The Court said:

> "In determining whether it is (i.e., consistent with public necessity and convenience), the Commission must have **regard** to the needs of both intrastate and interstate commerce. . . .
>
> "The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the

benefits to particular communities and commerce of continued operation must be weighed against the **burden thereby imposed upon commerce** [citation omitted]. The result of this weighing—the judgment of the Commission—is expressed by its order granting or denying the certificate."

The actual situation reflected by the *Colorado* case is far different from the holding for which respondent is citing it. Since *burden upon interstate commerce* is only one factor to consider in abandonment cases, the Commission *must* consider that factor as well as other relevant factors and its decision is expressed in terms of public necessity and convenience, as requiring the granting or refusal of the application. This is far different from saying that the I.C.C. need not consider the burden upon interstate commerce and that no burden has to exist for the I.C.C. to permit a railroad to abandon intrastate service rendered in an interstate train operation. Certainly, the I.C.C. must discuss and consider the question of the burden upon interstate commerce as to any intrastate service, otherwise its action would be arbitrary and not in accordance with the constitutional authority stemming from the *Shreveport* case. The Court specifically stated:

"The exertion of the Federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service [cases omitted.]

• • •

"The jurisdiction exercised by the Commission in these cases is in essence that which was involved in

the Shreveport Case, 234 U.S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce."

If, as respondent contends, Congress' regulation of interstate commerce, once that attaches, obviates any requirement to make any findings that intrastate commerce burdens interstate commerce, all the language quoted above from the *Colorado* case is superfluous and inaccurate, because in the *Colorado* case the railroad was engaged in interstate commerce. If there is no requirement in the commerce clause of the Constitution that a "finding of burden on interstate commerce as a condition precedent to the application of this regulatory power to the intrastate segment of service provided by an interstate train," then it would seem that all of the above-quoted material from the *Colorado* case did not belong. In the *Colorado* case the branch line to be abandoned was engaged in interstate commerce as well as intrastate commerce. As to the interstate commerce aspect, Congress has plenary power under the Commerce Clause. But to say it also has plenary over the intrastate aspects, as well, because it has plenary power of interstate aspects is not true. *If it were true, then your Honorable Court would not have been speaking in terms of the Shreveport doctrine when discussing the power of the I.C.C. over the intrastate aspects as well.* The true rule to be deduced from the *Colorado* case is that the power of Congress over intrastate service being rendered by an interstate train is circumscribed within the *Shreveport* doctrine, i.e., the intrastate aspects must continue to burden the railroad in interstate commerce even after the interstate service of the particular line or branch is abandoned.

(A) Frustration Argument

Respondent repeats the argument made by the Court of Appeals that the power of Congress would be frustrated if every State through which an interstate train passed could require the railroad to maintain or restore service.

This is not a true argument. The power of Congress in this case, as in the *Colorado* case, and similar cases, stems from the *Shreveport* doctrine. All Congress has to do is to comply with that doctrine, namely, find undue prejudice to interstate commerce. In the present case, there was no attempt to comply with the *Shreveport* doctrine. If frustration exists, it is then of Congress' own doing, namely, failure to comply with the *Shreveport* doctrine. What was said by your Honorable Court in the *Colorado* case has been repeated many times, including in *Yonkers v. U.S.*, 320 U.S. 685, 690-691:

> "**The power of the Commission to control the abandonment of intrastate branches of interstate carriers STEMS from the power of Congress to protect interstate commerce from undue burdens or discriminations.** [Cases cited.]"

If Congress chooses to ignore the *Shreveport* doctrine and permit abandonments (or their lesser counterpart, discontinuances) to take effect without any notice to, or regard for, the protection of interstate commerce from undue burdens or discrimination, then Congress has itself to blame. Section 1(18)—the Section under which *Colorado* was decided—provides for a hearing, evidence and findings. The State of Pennsylvania is not trying to thwart the power of Congress, but it wants Congress to

comply with its powers which stem from the *Shreveport* doctrine, i.e., to recognize its rights in the matter. This may only be done by a hearing, evidence and findings.

If it were argued that it would be expedient for Congress to be able to authorize discontinuances, without a hearing, without evidence and without findings, in other words, without compliance with the *Shreveport* doctrine because national policies would be frustrated—then it may be answer enough that Section 1(18), dealing with abandonments, has never been considered as frustrating national policies! Certainly, an abandonment is even more important to a railroad than a discontinuance! Yet, in the case of the more important application, namely, an abandonment, hearings, findings and compliance with the *Shreveport* doctrine are required. Therefore, to require them for discontinuances can hardly be said to frustrate national policies!

It may also be added, as an aside, that until 1958, the Interstate Commerce Commission had no jurisdiction over train discontinuances (which is what is here involved) and each state through which the train passed did have the right to exercise its own authority so far as the operation of the train within its borders was concerned: *New Jersey v. New York, S. & W. R. Co.*, 372 U.S. 1, 5. If the denial to the States of the right to regulate discontinuances of service of an interstate train were so vital to the country, one would wonder why Congress allowed such State authority to exist for 177 years! Yet, if the time has now come, and it apparently has, for the Federal Government to regulate both abandonments (§(18)), and discontinuances (§13a(1)), then Congress should comply with the *Shreveport* doctrine in passing upon discontinuances,

as it does, when it passes upon abandonment applications under §1(18).

(B) Texas v. Eastern Texas R.R., 258 U.S. 204

The power of Congress over interstate commerce, *per se,* is not decided by whether a particular railroad line has its tracks physically within a State or whether it crosses another State. The issue is whether the railroad, in operating its trains, is engaged in interstate commerce. All hands will agree that a railroad which has its tracks physically only in one State may still be **exclusively** engaged in interstate commerce. No citation is needed for this!

Yet, respondent attempts to distinguish *Texas v. Eastern Texas R.R.* on the ground that the line there was entirely within the State of Texas. This does not mean a thing if the line were also engaged exclusively in interstate commerce. The material fact in the *Texas* case was that part of the line was engaged in interstate commerce and part engaged in intrastate commerce. This, of course, can also be true of a railroad which crosses a state line. In both cases the same crews may be involved, etc. Nevertheless, although there may be justification for abandoning the interstate aspects, as there was in the *Texas* case, there still must be compliance with the *Shreveport* doctrine for ordering the abandonment of the intrastate aspects as well. This statement of the law is entirely in accord with the *Colorado* case.

In the *Colorado* case the evidence justified the application of the doctrine; in the *Texas* case, the evidence did

not justify it. That the physical limits of the track in the *Texas* case were confined to one State was accidental and of secondary importance. If the *Texas* case were to arise again, and the evidence did not bear out that the intrastate operation would in any way affect or burden interstate commerce, the decision would have to be the same. **That is to say, if the intrastate operation is prosperous and necessary, but the interstate operation is losing money, there would be a basis for permitting the interstate operation to cease, while there would not be a basis for permitting the intrastate operation to cease.** If in the *Colorado* case the evidence showed that the intrastate operation was very successful and prosperous, Congress could not decree its abandonment unless undue prejudice or burden upon interstate commerce was proved.

II. Katzenbach v. McClung, 379 U.S. 294; U.S. v. Darby, 312 U.S. 100, Do Not Apply

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The facts of these cases will show their inapplicability to the case at bar. In *Katzenbach v. McClung,* Congress passed an act requiring restaurants, *inter alia,* which carried on business in interstate commerce not to discriminate. The issue in that case was whether there was a substantial connection with interstate commerce, i.e., whether the purchases of food in interstate commerce or the serving of interstate travelers constituted a substantial basis for attempting to regulate discrimination by the restaurant.

The Court found, upon consideration of the Congressional record, that there was a rational basis. The Court then proceeded to find that the restaurateur involved did come under the Act and was guilty of violating it.

That case is totally different from the case at bar. There Congress laid down what a restaurant operator must do or not do, assuming he was subject to the Act. There was a rational basis for this regulation. In the case at bar Congress has not laid down what a railroad must do or not do. There is no rule, e.g., that all railroads performing interstate transportation must cease operating in intrastate commerce. (Of course, such a law would not have a rational basis).

The case at bar is simply the case of permitting a discontinuance of local as well as interstate service without compliance with the Shreveport doctrine. Since Congress'

power over the discontinuance of local service is based solely upon the *Shreveport* doctrine, Congress has exceeded its power.

In short, the Act in the *Katzenbach* case, as well as the *Darby* case, was a general act which made a rule for all those subject to it. The rule required by each Act had a rational basis—namely, the Congressional Record.

In our case Congress has not attempted or undertaken by the 1958 Act to permit the discontinuance of all intrastate service, as such. Hence, there is no reason to even consult the Congressional Record for a rational basis. Congress has left the question of discontinuance of local service to be handled on a piece-meal basis. The railroad, when and if it decides it wants to abandon local service performed on an interstate train, can proceed before the State Commission, with the right of "appeal" to the I.C.C., or it can go to the I.C.C. itself first. There is no pronouncement in the 1958 Act that all intrastate railroad service upon interstate lines is burdensome and should forthwith be abolished. There is no general rule set forth by Congress. On the contrary, §13a(1) recognizes that there may be cases where the intrastate service is not a burden and should be continued by direct order of the I.C.C. after a four month investigation. Hence, we have essentially different acts in the case at bar from the acts involved in *Katzenbach* and *Darby*.

The only issue in our case is whether Congress can authorize discontinuances to take place on a case-by-case basis not only of interstate service, but also of local service, without complying with the *Shreveport* doctrine.

Congress, and respondent, are of the view that once a railroad is engaged in interstate commerce, the *Shreve-*

port doctrine does not apply and need not be complied with. **Yet, in the Colorado case as well as the Texas case, both railroads were performing** services in interstate commerce, nevertheless, your Honorable Court, in both decisions, acted upon the proposition that the *Shreveport* doctrine **must** be complied with as to the intrastate aspects.

Conclusion

The questions presented are substantial and require plenary consideration. It is respectfully submitted that this is a proper case for the grant of the Petition for Certiorari.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition is presented in good faith and not for delay, and that said petition is restricted to the grounds specified in Rule 58 of the Supreme Court of the United States.

EDWARD MUNCE,
Assistant Counsel,
For Pennsylvania Public Utility Commission.